No. 90-527

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BROWER'S MOVING & STORAGE, INC.,
Petitioner,

— v. —

C. VICTOR BENSON, ROBERT CORBETT, ARTHUR EISENBERG, JEFFREY S. MORGAN, JAMES O'CONNOR, as TRUSTEES AND FIDUCIARIES OF THE TEAMSTERS LOCAL 814 PENSION, ANNUITY AND WELFARE FUNDS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

EUGENE S. FRIEDMAN
Counsel of Record

MICHAEL BARRETT
FRIEDMAN & LEVY-WARREN
1500 Broadway
New York, NY 10036
(212) 354-4500

Attorneys for Respondents

ALTERNATIVE STATEMENT OF QUESTION 1

In an action brought by Trustees of employee benefit funds pursuant to Section 515 of ERISA, may an employer assert defenses based on (a) the union's abandonment of the collective bargaining agreement in which the agreement to contribute is contained, or (b) the union's lack of majority status at the time the agreement was entered into?

TABLE OF CONTENTS

Page

Alternative Statement of Question 1.....i

Table of Authorities.....iii

Statement of the Case.....1

Reasons Why the Petition Should be Denied.....5

I. The Question of Whether Brower's Should Be Allowed to Raise Defenses of Abandonment and Lack of Majority Support Is Not an Important Question of Federal Law.....5

II. No Important Issues Are Raised By Brower's Frivolous Arguments that ERISA Does Not Provide Subject Matter Jurisdication of This Action and That the Courts Must Defer to the National Labor Relations Board on the Issue of the Agreement's Validity.....15

A. The federal courts have subject matter jurisdiction under ERISA to determine the validity of agreements....16

B. The federal courts need not defer to the NLRB.....22

III. The Question of the Federal Court's Jurisdiction Under Section 301 of the LMRA Is Irrelevant to the Instant Action.....25

Conclusion.....31

TABLE OF AUTHORITIES

CASES PAGE

A.T. Massey Coal Co. v. UMW, 799 F.2d 142 (4th Cir. 1986), cert. den., 481 U.S. 1033 (1987).....28

Bell v. Hood, 327 U.S. 678 (1946).....19

Bituminous Coal Operators' Association v. Connors, 867 F.2d 625 (D.C. Cir. 1989).....8

Central States Pension Fund v. Behnke, 883 F.2d 454 (6th Cir. 1989).....8

Central States Pension Fund v. Gerber Truck Service, Inc., 870 F.2d 1148 (7th Cir. 1989).....8,10,24

Glaziers & Glassworkers Union No. 767 v. Custom Glass Distributors, 689 F.2d 1339 (9th Cir. 1982).....30

Huessner v. Nat'l Gypsum Co., 887 F.2d 672 (6th Cir. 1989).....29

John S. Griffith Constr. Co. v. Southern Calif. Cement Masons, 607 F.Supp. 809 (C.D. Cal. 1984).....27

Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1982).....12,13,21

-continued-

Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539 (1988).....19

Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960).....12

Moldovan v. Great Atlantic & Pacific Tea Co., 790 F.2d 894 (3rd Cir. 1986), cert. denied 485 U.S. 904 (1988).....23

Paramount Press, Inc., 187 N.L.R.B. 586 (1970).....6

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).....14

Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364 (1984).....23

Southern California Retail Clerks Union and Food Employers Joint Pension Trust Fund v. Bjorklund, 728 F.2d 1262 (9th Cir. 1984).....24

Southwest Administrators, Inc. v. Rozay's Transfer, 791 F.2d 769 (9th Cir.), cert. denied., 479 U.S. 1065 (1987).....8

Trustees of Laborers Local Union #800 Health and Welfare Trust Fund v. Pump House, Inc., 821 F.2d 566 (11th Cir. 1987)(same).....8

United States v. Utah Construction and Mining Co., 384 U.S. 394 (1966).....14

Wicksham Contracting Co. v. Bd. of Educ. of New York, 715 F.2d 21 (2d Cir. 1983).....14

STATUTES

29 U.S.C. §185.....2,25-30
29 U.S.C. §1132.....2,16,17,18,20,22
29 U.S.C. §1145.....passim

OTHER AUTHORITIES

LEGISLATIVE MATERIALS

126 Cong. Rec. 23039 (1980).....11
13 Moore's Federal Practice ¶810.41 (1990).....8

STATEMENT OF THE CASE

The instant action is one to collect delinquent contributions to employee benefit plans promised in two consecutive collective bargaining agreements between the petitioner Brower's Moving & Storage, Inc. ("Brower's") and Local 814, International Brotherhood of Teamsters ("Local 814" or "the Union"). The first of these agreements was effective April 1, 1983 through March 31, 1986, and the second April 1, 1986 through March 31, 1989. It is undisputed that the first agreement was executed by Clifford W. Brower (Appendix B to Brower's Petition at 3), and that Brower's entered into the second agreement by the execution of a Memorandum of Agreement. Appendix C at 17; Petition at 7.

The action was brought pursuant to Sections 502 and 515 of the Employee Retirement Income Security Act, ("ERISA") 29 U.S.C. §§1132 and 1145, by the Trustees of the Local 814 Pension, Annuity and Welfare Funds ("the Funds"). See Petition at 3-4. As an alternative to the ERISA claim, the Funds also asserted a claim under Section 301 of Labor Management Relations Act, 29 U.S.C. §185. See Petition at 4-5.

Brower's consistently implies that the defenses it sought to raise show that it "never agreed to the obligation" to contribute to the Funds or that "the promise did not exist." See, e.g. Petition at 14-15. However, it is undisputed that Brower's knowingly executed documents which contained promises to contribute to the Funds.

Petition at 7. Brower's defenses of abandonment of these executed agreements by the Union and lack of majority status at the time the agreements were made, may go to the issue of the enforceability of such agreements, but not to the fact that Brower's knowingly entered into them in the first place.

Brower's Statement of the Case also gives insufficient attention to the decision of the National Labor Relations Board concerning the unfair labor practice charge filed by the Union. That decision, which was enforced by the Court of Appeals for the Second Circuit, all but renders moot the issues Brower's would present to this Court.

The Board has held that the 1986-1989 collective bargaining agreement between Brower's and the Union, one of the

two agreements upon which the Funds relied in the instant action, "is valid and gives rise to an irrebutable presumption of majority status and that the Union has not abandoned its administration of the contract." Appendix C at 8. This decision was rendered by the Board on November 8, 1989 and was enforced by the Court of Appeals for the Second Circuit on August 29, 1990. Appendix D.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

The Question of Whether Brower's Should Be Allowed to Raise Defenses of Abandonment and Lack of Majority Support Is Not an Important Question of Federal Law

Brower's contends that this case raises the general issue of whether an employer may defend an action to collect delinquent contributions brought pursuant to Section 515 of ERISA on the grounds that the underlying collective bargaining agreement is invalid or unenforceable. However, the only two defenses Brower's attempted to raise below -- abandonment of the agreement and lack of majority support of the union -- are based on the unique factual circumstances of this case and therefore lack general significance.

A claim of abandonment requires the complete disregard of an existing

collective bargaining relationship by a recognized or certified union. See, e.g., Paramount Press, Inc., 187 NLRB 586 (1970). Similarly, Brower's claim of lack of majority support can only succeed if "both parties' practice under the agreements showed that the parties did not intend them to be effective collective bargaining agreements," thereby falling into "a narrow exception to general rule" that majority status is presumed to exist during the term of a collective bargaining agreement. NLRB Decision, Appendix C at 6.

Brower's has not indicated a single prior instance in which either defense has been raised in a Section 515 action in the ten year period since Congress enacted the statute. Thus, Brower's cannot claim that resolution of

the question of whether it can raise such defenses in a Section 515 action is of general significance.

Moreover, the Second Circuit recognized that Brower's purported "abandonment" defense does not even address the question of an agreement's validity or enforceability outside the specific National Labor Relations Board context from which it arises:

> Abandonment is an NLRB doctrine by which an outside union seeking to represent employees may defeat the claim of the employer and incumbent union that an existing collective bargaining agreement acts as a bar to the outside union's petition for representation... A determination that a contract does not bar an election "is not equivalent to a holding that for all purposes there is no valid written agreement."

Appendix A at 12 (citations omitted). The Petition does not seek review of this

holding by the Second Circuit, which independently resolves the abandonment defense. This Court only reviews issues not raised in a timely petition in extraordinary circumstances. 13 Moore's Federal Practice ¶810.41 (1990)

In any event, the rejection of Brower's defenses rests on the routine application of settled federal law. Brower's concedes that every circuit court of appeals which has addressed the issue has held that employers may not raise defenses that merely call into question a union's ability to enforce the contract generally. See, e.g., Central States Pension Fund v. Gerber Truck Service, Inc., 870 F.2d 1148 (7th Cir. 1989) (rejecting defense that subsequent oral agreements and correspondence had superseded or terminated collective

bargaining agreement); Central States Pension Fund v. Behnke, 883 F.2d 454 (6th Cir. 1989) (same); Bituminous Coal Operators' Association v. Connors, 867 F.2d 625 (D.C. Cir. 1989)(rejecting defense that contract is invalid as the result of unilateral or mutual mistake of fact); Southwest Administrators, Inc. v. Rozay's Transfer, 791 F.2d 769 (9th Cir.), cert. denied., 479 U.S. 1065 (1987) (rejecting challenge to contract's validity based on fraudulent inducement); Trustees of Laborers Local Union #800 Health and Welfare Trust Fund v. Pump House, Inc., 821 F.2d 566 (11th Cir. 1987)(same).

None of the cases cited above dealt specifically with an abandonment or a "lack of majority" defense. However, such defenses, at best, go to the general

enforceability of the agreement by the union, and are therefore squarely within the scope of the defenses rendered irrelevant by Section 515. The Gerber Truck court, after an exhaustive analysis of the legislative history and policy implications of Section 515, summarized the effect of the provision:

> If the contract provides for the commission of unlawful acts, it will not be enforced. Kaiser Steel Corp. v. Mullins, 455 U.S. 72... If the employer simply points to a defect in its formation - such as fraud in the inducement, oral promises to disregard the text, or the lack of majority support for the union and the consequent ineffectiveness of the pact under labor law - it must still keep its promise to the pension plans.

Gerber Truck, supra, 870 F.2d at 1153.

Defenses based on labor laws in general, and on lack of majority support

in particular, are defenses that Congress most clearly intended to bar in an ERISA collection action. Representative Thompson, the floor manager of the legislation which added Section 515 to ERISA, stated that Section 515 was intended to "permit trustees of plans to recover delinquent contributions efficaciously and without regard to issues which might arise under labor-management relations law--other than 29 U.S.C. 186" (a section not relevant here). 126 Cong. Rec. 23039 (1980). As the Second Circuit noted, Representative Thompson, specifically identified two district court opinions upholding "lack of majority support" defenses to fund contribution actions as decisions the legislation was intended to correct. Appendix A at 12-14. Accordingly, the Second Circuit rejected the defense "in light of this unmistakably clear legislative intent." Id. at 14.

Moreover, the Supreme Court has already addressed the general issue of defenses available in fund collection actions in two prior decisions which form the foundation of the circuit court opinions cited above. In Lewis v. Benedict Coal Corp., 361 U.S. 459, 464-466 (1960), this Court held that an employer may not assert a union's breach of the collective bargaining agreement as a defense to a fund's suit for breach of the provision of the agreement requiring contributions to the fund. Lewis was decided before the passage of Section 515 and was one of the cases Rep. Thompson expressly approved as a model for what Section 515 was intended to achieve. Appendix A at 12.

In Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 86-88 (1982), this Court held

that a defense which claims that the agreement to contribute to a fund was unlawful survived the passage of Section 515. However, the Court noted the same legislative history relied on by the lower courts here, and the other courts of appeals, and carefully limited its holding to defenses "based on the illegality of the very promise [to contribute to the fund] sought to be enforced." Id. at 88.

The decision of the Second Circuit here is completely consistent with these prior decisions of this Court. Brower's defenses of abandonment and lack of majority status are not analogous to a claim that its agreement to contribute to the Funds is unlawful. At best these defenses go to conduct of the Union analogous to a breach of the agreement by the Union which is unrelated to the agreement to contribute in the Funds.

Finally, Brower's defenses are all but rendered moot by the findings of the NLRB and the Second Circuit in the Union's unfair labor practice case that the 1986-1989 agreement is valid and enforceable. Appendix C at 8; D at 4. Brower's is now precluded from relitigating this issue in the Funds' federal court action. United States v. Utah Construction and Mining Co., 384 U.S. 394, 421-22 (1966); Wicksham Contracting Co. v. Board of Education New York, 715 F.2d 21 (2d Cir. 1983). Even though the Funds were not a party to the NLRB action, the findings of the NLRB may be applied to estop Brower's. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). Thus, unless Brower's seeks a writ of certiorari in the NLRB case, and the Court grants the writ and reverses the NLRB and the Second Circuit on this issue, Brower's has

already lost on the merits of the defenses it is now seeking an opportunity to present.

II.

No Important Issues Are Raised By Brower's Frivolous Arguments that ERISA Does Not Provide Subject Matter Jurisdication of This Action and That the Courts Must Defer to the National Labor Relations Board on the Issue of the Agreement's Validity

Brower's argues that ERISA does not grant the federal courts "jurisdiction" to resolve the issue of the enforceability of the collective bargaining agreement by the Funds and that the issue must be deferred to the NLRB. These arguments are frivolous and do not warrant further review.

The Second Circuit did not find it necessary to address these claims in detail, but summarily rejected them.

Appendix A at 15. The district court described the lack of jurisdiction argument as "seriously flawed" and determined that the deferral to the NLRB was not required because the defenses Brower's would raise there were irrelevant. Appendix B at 8 and 13 n.5.

A. The federal courts have subject matter jurisdiction under ERISA to determine the validity of agreements.

Any argument that federal courts lack subject matter jurisdiction over delinquent contribution actions brought pursuant to ERISA is directly contrary to the plain meaning of the statute. Section 502(e)(1) of ERISA grants federal district courts exclusive jurisdiction of civil actions, other than by a beneficiary to recover a benefit, brought under

Subchapter I of ERISA. 29 U.S.C. §1132(e)(1), Petition at 3.

Section 515 of ERISA, 29 U.S.C. §1145, is part of Subchapter I. Section 515 requires employers who are obligated under the terms of a collective bargaining agreement to make contributions to benefit plans to "make such contributions in accordance with the terms and conditions of such plan or such agreement." 29 U.S.C. §1145. An action by fiduciaries of employee benefit funds to enforce Section 515 is a cause of action authorized by §502(a)(3) "to enforce any provision of this subchapter," and is thus squarely within the exclusive jurisdiction granted to federal courts pursuant to Section 502(e)(1).

The Trustees have asserted precisely this cause of action. The

Trustees alleged that they are fiduciaries of the Funds. The Trustees alleged that Brower's was obligated to make contributions to the Funds pursuant to two consecutive collective bargaining agreements which it executed, and that Brower's breached the agreements by paying less than the amount of contributions required by these agreements. Thus, the Trustees stated a claim for a violation of Section 515 and the district court had exclusive jurisdiction pursuant to Section 502(e).

Brower's asserts without explanation or citation to relevant precedent that the federal courts are without "jurisdiction" under Section 515 and 502 to decide the issue of the "validity" of the agreement which is alleged to be violated. The existence of

a collective bargaining agreement is merely one element of a Section 515 action, Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539 (1988), rather than a prerequisite for federal court jurisdiction to decide that issue. See generally, Bell v. Hood, 327 U.S. 678 (1946).

Contrary to Brower's assessment of the case, Advanced Lightweight, 484 U.S. at 545-549 and n. 15-16, does not hold that agreements to contribute are "presumed to exist," or that federal courts lack jurisdiction to consider their validity. On the contrary, it holds that the existence of an agreement to make the contributions is a necessary element to establishing liability under ERISA. This element is established here by the

unrebutted proof that Brower's executed the two agreements.

Notwithstanding the clear language of §502 of ERISA, Brower's apparently asserts that Congress intended that whenever a defendant in a Section 515 action denies the existence of the contract or raises an affirmative defense to the contract, and thereby puts the "validity" of the contract at issue, the federal court is without jurisdiction to proceed (apparently until the issue is decided in some other forum). As Brower's would have it, federal courts which have exclusive jurisdiction of Section 515 actions are in the unique position of being unable to proceed with the action because they lack jurisdiction to decide an essential element of such claims. Inasmuch as Congress enacted Section 515

with the express intent to simplify collection actions brought by trustees, Kaiser Steel Corp. v. Mullins, 455 U.S. at 86, it could not have required that trustees collect delinquent contributions by proceeding with two separate litigations, first seeking confirmation of the validity of the agreement in one forum, and then litigating issues of breach of the agreement and damages before the federal courts.

Federal court decisions after Kaiser Steel have routinely addressed and disposed of defenses going to contract validity in Section 515 actions whenever they have been raised. See cases cited supra at 8-9. On the other hand, Brower's has failed to cite a single case which even suggests that federal courts lack subject matter jurisdiction under Sections

515 and 502 to decide issues going to the validity of a collective bargaining agreement.

Morever, this issue is all but moot after the NLRB decision, because as described above, Brower's is precluded from relitigating the issue of the validity of the agreement.

B. The federal courts need not defer to the NLRB

The argument that deferral to the NLRB is necessary to avoid conflicting decisions is now moot because the NLRB held that the collective bargaining agreement was enforceable by the Union and directed that Brower's comply with the agreement, including making contributions to the Funds. This decision was enforced by the Second Circuit. Appendix D.

Accordingly, there is no longer any danger of conflicting results on the issue of the enforceability of the contract.

Moreover, even if the NLRB had determined that the contract was not enforceable by the Union in an unfair labor practice action, such a decision would not be binding on the Funds. The Funds have distinct legal rights from the Union, and are not bound by an adverse ruling in an action brought by the Union. Moldovan v. Great Atlantic & Pacific Tea Co., Inc., 790 F.2d 894 (3rd Cir. 1986), cert. denied 485 U.S. 904 (1988)(fund not bound by arbitration award involving employer and union). See, generally, Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364 (1984).

Furthermore, in a decision adverse to the Union, the NLRB could not decide

any issues relevant to Brower's liability to the Funds under ERISA. It is now well settled that, pursuant to Section 515, employee benefit funds have greater rights to enforce contribution obligations than do unions to enforce agreements generally. (See Point I, above). Once the existence of a written agreement to contribute has been proven, the only issue relevant to a Section 515 action which the NLRB might resolve is whether the provision requiring contributions is unlawful. Gerber Truck, supra, 870 F.2d 1148, 1153; Southern California Retail Clerks Union and Food Employers Joint Pension Trust Fund v. Bjorklund, 728 F.2d 1262, 1264 n. 2, 1265 (9th Cir. 1984). Brower's has not claimed that the provisions of the agreements requiring contributions to the Funds are illegal. Thus, there would be no inherent conflict between a court decision in favor

of the Funds and a Board decision adverse to the Union.

III.

The Question of the Federal Court's Jurisdiction Under Section 301 of the LMRA Is Irrelevant to the Instant Action

Brower's contends that the federal courts lack subject matter jurisdiction under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, to adjudicate the validity of a collective bargaining agreement as opposed to a breach of the agreement. This question is irrelevant to the instant action and will be rendered moot unless this Court grants review and reverses the Second Circuit on the questions involving the ERISA cause of action.

The claim for relief under Section 301 of the LMRA is merely an alternative

to the ERISA claim and was not a factor in the grant of summary judgment to the Funds. The district court addressed the LMRA claim in dicta and resolved it in favor of the Funds, but the Court of Appeals did not address the issue.

In any event, the federal courts' jurisdiction in Section 301 actions does not warrant review. Although Brower's points to a split in the circuits over whether courts have jurisdiction under Section 301 when the only question before the court is the validity of an agreement (Petition at 21-23), none of the circuits has held that they lack jurisdiction when, as here, both validity of the agreement and breach of the agreement are at issue.

The cases relied upon by Brower's make it plain that, where Section 301 jurisdiction has been rejected, it is

because the complaint sought only a declaration that the agreement at issue was either effective or ineffective. In each case, a claim for breach of the agreement was lacking.

For example, John S. Griffith Constr. Co. v. Southern Calif. Cement Masons, 607 F.Supp. 809 (C.D. Cal. 1984), does not hold, as suggested by Brower's, that federal courts do not have jurisdiction under Section 301 whenever the validity of the contract is put at issue. That case held that there is no such jurisdiction when validity is the only issue sought to be resolved. The plaintiff in John S. Griffith sought only a declaratory judgment on the issue of the validity of a pre-hire agreement. Id. at 811. It did not allege a breach of the contract. Id. at 813. The court held

merely that Section 301 was not available for such declaratory judgments on the "validity of contracts where validity is the ultimate issue." Id. at 812. It expressly distinguished cases where a breach of contract was also alleged, holding that, in such cases, Section 301 jurisdiction would exist. Id. The court recognized that the issues concerning the existence of a valid contract may well have been raised in such a case, but noted that "they would have been merely threshold issues reached by the court as it attempted to enforce the contract." Id. at 813. Thus, the case stands only for the proposition that federal courts will not entertain Section 301 actions which do not involve allegations of breach of contract.

Similarly, the court in A.T. Massey Coal Co. v. UMW, 799 F.2d 142, 146

(4th Cir. 1986), cert. den., 481 U.S. 1033 (1987), held that Section 301 "affords no....jurisdiction in the case of a declaratory judgment brought to show that there was no contract to which the companies were bound." The court recognized that where a plaintiff alleges a breach of a contract, jurisdiction is present under Section 301. Id. See also, Huessner v. Nat'l Gypsum Co., 887 F.2d 672, 675-76 (6th Cir. 1989)(where plaintiff merely challenges validity of contract and does not allege breach of contract, no Section 301 jurisdiction exists).

Because the Funds here have sought to remedy a breach of the collective bargaining agreements, Section 301 provides an alternative basis for the court's federal question jurisdiction.

Moreover, as the district court recognized, the trend is to extend Section 301 jurisdiction even to those actions where plaintiffs put only the validity of the contract at issue. See Appendix B at 8-9, and cases cited therein.

The courts' jurisdiction under Section 301 is not preempted by the exclusive jurisdiction of the NLRB for the same reasons discussed above at Point I, with respect to the court's ERISA jurisdiction. Even, if Brower's defenses of abandonment or lack of majority status are within the exclusive jurisdiction of the NLRB, only those defenses are precluded, not the Funds' cause of action. Glaziers & Glassworkers Union No. 767 v. Custom Glass Distributors, 689 F.2d 1339, 1343-1345 (9th Cir. 1982).

CONCLUSION

For all of the foregoing reasons, Brower's petition for a writ of certiorari should be denied.

Dated: New York, New York
October 23, 1990

Eugene S. Friedman
Michael Barrett
Friedman & Levy-Warren
1500 Broadway
Suite 2303
New York, NY 10036

Attorneys for Respondent